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91-277

No. 91-_____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

ADD VENTURES, LTD.,

Petitioner,

v.

UNITED STATES OF AMERICA,

and

FRONTIER MINING, INC;
EMPIRE EXPLORATION, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

The petitioner contends that the decision of the Court of Appeals conflicts with interpretations of the Constitution by this Court involving three important principles, as reflected in the following questions:

(1) Did the Court of Appeals improperly defer to an administrative agency's interpretation of a statute in a matter of constitutional dimension?

(2) Did the Court of Appeals fail to recognize this Court's express limitations on its upholding of the consitutionality of 43 U.S.C. 1744?

(3) Does the forfeiture allowed by the Court of Appeals amount to a denial of equal protection of laws?

(As to Question No. 2, the Ninth Circuit Court of Appeals conflicts with the Tenth Circuit Court of Appeals which has recognized one of those limitations.)

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I.

STATEMENT OF JURISDICTION

The petitioner respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the Ninth Circuit Court of Appeals. The Court of Appeals issued its Memorandum Decision in Case No. 90-35573 on May 15, 1991, reversing the judgment of the United States District Court for the District of Alaska in Case No. A87-075 Civ., dated April 23, 1990. See, Appendix at A-1 and A-4.

This Court has jurisdiction pursuant to 28 U.S.C. 1254(3). This petition is being timely filed in accord with 28 U.S.C. 2101(c).[1]

II.

APPLICABLE CONSTITUTIONAL PROVISION

The quoted portion of the Fifth Amendment to the United States Constitution applies in this case:

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[1] All parties are named in the case title.

No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The applicable Statute is 43 U.S.C. 1744(a) and (c):

(a) Filing requirements

The owner of an unpatented lode or placer mining claim located prior to October 21, 1976, shall, within the three-year period following October 21, 1976 and prior to December 31 of each year thereafter, file the instruments required by paragraphs (1) and (2) of this subsection. The owner of an unpatented lode or placer mining claim located after October 21, 1976 shall, prior to December 31 of each year following the calendar year in which the said claim was located, file the instruments required by paragraphs (1) and (2) of this subsection:

(1) File for record in the office where the location notice or certificate is recorded either a notice of intention to hold the mining claim (including but not limited to such notices as are provided by law to be filed when there has been a suspension or deferment of annual assessment work), an affidavit of assessment work performed thereon, on a detailed report provided by section 28-1 of title 30, relating thereto.

(2) File in the office of the Bureau designated by the secretary a copy of the official record of the instrument filed or recorded pursuant to paragraph (1) of this subsection, including a description of the location of the mining claim sufficient to locate the claimed lands on the ground.

* * *

(c) Failure to file as constituting abandonment; defective or untimely filing

> The failure to file such instruments as required by subsections (a) and (b) of this section shall be deemed conclusively to constitute an abandonment of the mining claim or mill or tunnel site by the owner; but it shall not be considered a failure to file if the instrument is defective or not timely filed for record under other Federal laws permitting filing or recording thereof, or if the instrument is filed for record by or on behalf of some but not all of the owners of the mining claim or mill or tunnel site.

Pertinent regulations are in 43 CFR 3833.2-3 and 43 CFR 3833.4(a)-(d). See Appendix, pp. A49-A53.

III.

STATEMENT OF THE CASE

This case involves forfeiture of 139 placer mining claims which were located and maintained pursuant to federal law.

A. History of the Claims.

Add Ventures, Ltd. submitted an Application for Mineral Survey on April 30, 1977 (US-ER CR 07, p. 5).[2] That application shows that the claims were located at various dates from 1905 till 1961. An engineer's sketch of the locations on a topographical map is contained in the record. (US-ER CR 07, p. 25).

The claims were purchased by Add Ventures, Ltd. in 1976 from John Jacobsen for $383,000. The purchase was made pursuant to a contract over a period of years, so that as of the time of the forfeiture substantial interest and all of the principal except $50,000 had been paid to Mr. Jacobsen. (AV-ER 2 p. 2). Herbert Worthley, the owner of 11.41 percent interest in the Add Ventures, Ltd. partnership, states that Add Ventures, Ltd. is a limited partnership

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[2] References to the record are to the United States' Excerpt of the Clerk's Record (US-ER CR) and Add Ventures' Excerpt of the Record (AV-ER) submitted to the Court of Appeals. References to the Clerk's Record are denoted "CR."

under the laws of the State of Alaska, having one general partner, C.E. Bergland, and 21 limited partners. (AV-ER 2, p. 1). Mr. Worthley states that these mining claims are the only property of significance owned by Add Ventures, Ltd. In addition to paying on the purchase price, Add Ventures has incurred many expenses in maintaining and developing the claims. Besides principal and interest, these expenses include exploration and development work, mineral surveying and substantial legal costs and fees. Some of the payments have been made from minerals extracted from the claims. However, the partners have invested large amounts of money from sources independent of the claims. (AV-ER 2, p. 2). Mr. Worthley personally invested $80,000 in his limited partnership share and has made loans to Add Ventures in excess of $105,000, making a total of in excess of $185,000 from his own resources. (AV-ER 2, p. 3). Mr. Worthley stated that in the late 1970's C.E. Bergland sold a fourplex from which he received

$172,000, which was all invested in the claims. Mr. Bergland invested additional sums of money and thousands of hours of time in the claims. (AV-ER 2, p. 3). Other limited partners invested substantial sums and made loans also. Allen R. Sanderson has made loans in excess of $75,000 and Vern Wood has made loans of several thousand dollars, plus hundreds of hours of time for the benefit of the claims. Mr. Worthley has spent hundreds of hours of uncompensated time. (AV-ER 2, p. 3).

In 1979, Add Ventures, Ltd. rejected a purchase offer in the amount of $900,000. A conservative estimate of the owners' valuation of the claims at the time the BLM declared the forfeiture in 1985 was that the claims were worth well in excess of $2,000,000. (AV-ER 2, p. 4).

Most of the partners in Add Ventures, Ltd. are in their sixties or late fifties. At least three of the partners have virtually their entire life savings invested in the claims

subject to this litigation and several others have made substantial investments in the claims. (AV-ER 2, p. 6).

Each year Add Ventures, Ltd. performed assessment work on the claims and after enactment of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1744, it has filed its notice of intention to hold claims or an affidavit of assessment work timely with the BLM. In all years except 1984, the filing with the BLM has been in the form of the affidavit of assessment work which had been recorded in the appropriate state office. In 1984, the assessment work was performed, but the proof of assessment work was filed late due to the fact that the general partner, C.E. Bergland, was working at a remote location in the Aleutian Islands. (US-ER CR 07, pp. 85, 99; US-ER Exhibit 1 to CR 23, pp. 18-41).

The affidavit of assessment work was not completed until January 29, 1985 and recorded on January 30, 1985. (US-ER CR 07, pp. 102-109).

Add Ventures, nevertheless, gave notice to the BLM that it intended to hold its claims. Three specific written notices were relied on in the appeal to the Interior Board of Land Appeals (IBLA). A letter dated July 10, 1984, addressed to Barbard J. Nather, Chief, Mining Claim Recordation Adjudication Unit, Bureau of Land Management,[3] identifying the claims by serial numbers assigned by the BLM, notifying the BLM that Add Ventures, Inc. had been succeeded by Add Ventures, Ltd., and advising that Add Ventures, Ltd. had established the chain of title of all of the mining claims in a court trial in late 1981, was filed. (US-ER CR 07, p. 30). A certified copy of the Judgment and Decree Quieting Title was enclosed to show the BLM that Add Ventures had proved its chain of title to the satisfaction of the Superior Court for the State of Alaska. (US-ER CR 07, p. 30-46).

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[3] Barbara J. Nather is the person who signed the decision declaring the claims forfeited on May 14, 1985. (US-ER CR 07, p. 91).

On November 13, 1984, the attorney for Add Ventures wrote again to Barbara J. Nather requesting 30 days extension of time to respond to an "Order to Show Cause" because the general partner was working in the Aleutian Islands. (US-ER CR 07, p. 99). In that letter, the attorney stated:

> Further, it is unclear to me why any further information is being requested. The Order to Show Cause indicates that Add Ventures, Ltd. has filed with the BLM the necessary location notices. It also has established its present ownership by filing with the BLM its deed from John Jacobsen. Furthermore, we have provided a copy of a decree quieting title to the claims in Add Ventures, Ltd. We are unaware of any law which requires proof of the entire chain of title to the BLM. Sufficient proof has been made in a court of competent jurisdiction.

On November 20, 1984, the attorney for Add Ventures wrote again to Ms. Nather. (US-ER CR 07, p. 100, 101). Again, the claims were identified and request was made for the Order to Show Cause to be vacated and the prior notice to be withdrawn, both being without basis. the letter refers to a telephone conversation with the Assistant Regional Solicitor for the Department of Interior who did not indicate any legal basis for such requests by the BLM. The letter states, "Add Ventures, Ltd. has been fully cooperative with your office at all times up to now and will continue to be cooperative in processing its patent application."

B. The BLM Decision.

On May 14, 1985, Barbara J. Nather, Chief, Mining Claim Recordation Adjudication Unit, BLM, issued a decision declaring the Add Ventures mining claims to be void and rejecting its mineral survey applications. (US-ER CR 07, pp. 90-897). The decision points out that § 314(a) of FLPMA (43 U.S.C. § 1744(a)) requires

the owner of unpatented mining claims to file evidence of annual labor or notice of intention to hold with BLM by December 30 of each calendar year after 1979. The decision states, "Because the 1984 affidavit of assessment work or notice of intention to hold was not timely filed, the mineral claims listed on the attached appendix are deemed abandoned and declared void." (Appendix, p. A-18).

C. Appeal to the IBLA.

On June 13, 1985, Add Ventures, Ltd. filed with the BLM its notice of appeal of the May 14, 1985 decision to the Interior Board of Land Appeals. (US-ER CR 07, p. 79). On July 15, 1985, it filed its "Statement of Reasons and Appellant's Brief." (US-ER CR 07, p. 83-111).

The principal contention of Add Ventures in the appeal was that, through its agent, it had filed no less than three notices of intention to hold the mining claims during 1984. Id. at 85. It attached the three letters previously referred to. Id. at 98-100.

Add Ventures argued that § 314 of FLPMA allows the owner of mining claims the alternative of filing either a notice of his intention to hold the claim or an affidavit of assessment work, prior to December 31 of each year. In all years prior to 1984, it had done so by filing a copy of the affidavit of assessment work. In 1984, the assessment work was performed, but proof was filed late due to the fact that the general partner was in a remote location, but the affidavit of assessment work had subsequently been recorded in the local office and filed with the BLM. Id. at 85. A copy of the affidavit of assessment work was attached to the brief. See, Id. at 102-111. Add Ventures pointed out that 43 U.S.C. § 1744(a)(1) does not prescribe the form of the indicated "notice of intention to hold the mining claim." Although subsection (c) of that statute provides that failure to file such an instrument "shall be deemed conclusively to constitute and abandonment of the mining claim ...," that subsection provides

further, "... but it shall not be considered a failure to file if the instrument is defective or not timely filed for record under other Federal laws permitting filing or recording thereof, ..." Add Ventures contended that any fair reading of any of the three letters conveys notice of the intent of Add Ventures, Ltd. to continue to hold the claims in question. Each of the three letters was signed by an agent of Add Ventures and each was addressed to the very person who subsequently, in disregard of the letters, signed the decision declaring the claims void. All of the letters are in the BLM file pertaining to these claims, the same as the notices for other years. Add Ventures argued further that even if the letters do not comply fully with the form prescribed in subsequent regulations, they must be considered effective, because the statute is mandatory in its provision that a defective instrument shall not be considered a failure to file. Id. at 86-87. Add Ventures pointed out that each of the three

letters was sufficient to enable the BLM to accomplish the purposes of the statute as interpreted by the United States Supreme Court in United States v. Locke, 471 U.S. 84, 87-89, 105 S.Ct. 1785, 1788-89, 85 L.Ed.2d 64 (1985).

The IBLA decided the case December 19, 1986. Add Ventures, Ltd, 95 IBLA 44 (US-ER CR 07, pp. 112, 119). The most pertinent discussion is at 95 IBLA 49, Id. at 117. The IBLA states:

> We do not disagree with the appellant that the letters could support an inference that it intended to hold the claims; however, under the controlling statute and regulation the question is not whether appellant supplied a document which indicated that it intended to hold its claims, but whether it filed a Notice of Intent.

The IBLA agreed with Add Ventures that the statute does not prescribe the form a notice must take, but the IBLA said that this does not mean that any document sent to the BLM from

which intent might be inferred is sufficient. Id. According to the IBLA, whatever the form of the instrument, it must be filed with the BLM as Notice of Intent. Id. The IBLA then discusses the form and contents of the instrument to be filed with the BLM. It is clear that each of the three letters relied on by Add Ventures is sufficient in content except that none of the letters is a copy of a document which was or will be recorded in the local office where the claims' location notice has been recorded.

D. Judicial Review.

1. Proceedings.

On February 25, 1987, Add Ventures, Ltd. filed its complaint in the United States District Court, Case No. A87-075 Civ., seeking judicial review of the administrative proceedings. (US-ER CR 01). The District Court referred the matter to the United States Magistrate. (CR 2). After the United States filed its answer (CR 3), it was agreed at a planning conference that the parties would stipulate as to the

pertinent administrative record and then file cross motions for summary judgment, with briefing. (CR 5).

The United States filed its motion for summary judgment, with attached memorandum on October 15, 1987. (CR 6). The joint extract of the administrative record was filed the same date, (CR 7) and the administrative record was lodged with the court also the same date. (CR 8). Add Ventures' motion for summary judgment, with attached memorandum was filed on October 16, 1987. (CR 9).

2. Magistrate's report and recommendations.

The magistrate, after extensive briefing and oral argument by the parties, filed his Report and Recommendations on June 3, 1988. (AV-ER 4; CR 21). The magistrate concluded that the implementation of the statute by the BLM in this case "appears to be an 'unreasonable and severe means' applied in a manner that is arbitrary, capricious and contrary to the legisla-

tive purpose. The plaintiff should be held to have substantially complied with the requirement." (AV-ER 4, p. 29).

The magistrate recognized that although the interpretation of a statute by the agency charged with its administration is granted substantial deference, the courts are the final authority on the issue of statutory construction, especially where the construction requires consideration of broad concerns beyond the agency's expertise. Id. at 2-3. A court must reject administrative constructions of a statute inconsistent with a statutory mandate or that frustrate the policy that Congress sought to implement. Id. at 3. The magistrate said, "To interpret plaintiff's three letters as not constituting sufficient notices of intention to hold would defeat the very purposes underpinning the enactment of § 314 ... ." Id. at 18. He commented that, "Paintiff's correspondence sought to provide even more information than the statute or regulations require. ... Defendant's

argument degenerates when it discusses the three letters and states that 'from their context they clearly were not intended to be notices of intentions to hold.' ... That assertion is clearly wrong. From their context, the letters clearly were intended to show a notice to hold the claims." Id. at 19.

The magistrate did not accept the government's claim that reversal of the agency decision would "create a parade of horribles." Instead, "a reversal of the IBLA decision may provide a procession of justice. In all likelihood, few cases will be impacted by a reversal of the IBLA decision." Id. at 24. The magistrate commented further:

> This chamber deals with such notions as "arbitrary" or "capricious" or "unreasonable" or "contrary to law" or "simply wrong." The court rarely employs notions such as "absurd." That which is absurd is typically deemed "not reasonable." The defendant's position that Add Ventures,

> Ltd. abandoned its intention to hold the mining claims is arbitrary, capricious and unsupported by substantial evidence if not absurd.

Id. at 26.

Commenting on § 1744(c) which provides:

> It shall not be considered a failure to file if the instrument is defective or not timely filed for record under other federal laws providing for recording thereof...

the magistrate commented:

> This language is ambiguous as to whether such defective instrument is limited to those that are defective under other federal laws only or includes instruments required by subsections (a) and (b) of § 1744, such as the notices of intent to hold the mining claims. To allow the BLM to determine that the claimant has not complied with § 1744(a), although some notice had been timely filed, and thereby, unilaterally, without notice declare the mining

> claims void as abandoned not only deprives the claimant of due process but also establishes a system of allowing great abuse by the agency. Certainly, BLM has latitude in determining whether the claimant has complied with the law, but this administrative decision under the facts of the present case cannot lawfully be made without some participation by the claimant. It is a distinct possibility that BLM has not taken action to nullify mining claims in other instances where the instruments filed by the claimants could reasonably be questioned as defective instruments vis-a-vis the filing requirements of § 1744(a).

The magistrate concluded, "The 'conclusive' language is limited to the failure to file and does not cover defective filings." Id. at 28. "The letters in the instant case do not need even to be interpreted on a substantial compliance standard to be found to evince an intent not to abandon the claims. Since forfeiture is

questionable in this situation, it should be avoided." Id. at 25.

After the United States filed its objections to the Magistrate's Report and Recommendations and raised several new arguments (CR 22, 23, 29), the magistrate filed a Final Report and Recommendation that the plaintiff's motion for summary judgment be granted and the defendant's motion for summary judgment be denied. (CR 34).

3. District Court decision and judgment.

The District Court heard oral argument and announced its ruling in open court on April 20, 1990. (US-ER CR 107). Excerpts of the oral decision are at Appendix, pp. A24-A31.

The District Judge referred to this Court's decision in the Locke case, and commented that what the law ordinarily means by abandonment is not the issue, because the intention of the holder of the claims is immaterial. Rather, forfeiture results from the provisions of 43 U.S.C. § 1744(c). However, the same subsection contains some saving language to

the effect that a defective filing will not be considered a failure to file. There is no question that Add Ventures filed something and there is no question that the filing was defective. Add Ventures is entitled to any reasonable reading of the statute and applicable regulations to avoid a forfeiture. The District Judge concluded that the letters were defective instruments referred to in the clause after the semicolon of 1744(c) and that the agency was required to proceed pursuant to its own regulation at 43 CFR 3833.4(d), which required a notice and an opportunity to cure the defect.

The District Court then denied the motion of the United States for summary judgment and granted Add Ventures' motion for summary judgment. The court adopted the magistrate's report and recommendations as amplified and to the extent it was consistent with the comments of the court.

Judgment was entered vacating the agency decision and remanding to the agency with directions. (Appendix, p. A4-A5).

4. The appeal.

The intervenors filed a notice of appeal to the Ninth Circuit Court of Appeals on July 12, 1990 (CR 109). The United States filed its notice of appeal on August 21, 1990. (CR 120). The Court of Appeals heard oral arguments on May 6, 1991 and issued a Memorandum reversing the District Court which was filed on May 15, 1991. (Appendix, p. A1-A3).

IV.

ARGUMENTS STATING REASONS FOR GRANTING THE WRIT

A. The Court of Appeals Improperly Deferred to the Administrative Agency's Interpretation of the Statute.

In United States v. Locke, 471 U.S. 84, 105 S.Ct. 1785, 85 L.Ed.2d 64 (1985), this Court upheld the constitutionality of § 314 of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1744. Inherent in that decision

were several assumptions. The purpose of that section was to establish a federal recording system designed both to rid federal lands of stale mining claims and to provide federal land managers with up-to-date information that allows them to make informed land management decisions. 471 U.S. at 87. Federal mining claims are property subject to protection by the Fifth Amendment to the United States Constitution. 471 U.S. at 104. Congress intended to cause a forfeiture of all claims for which the filing requirements of § 314(a) had not been met. 471 U.S. at 98. As long as the constraint or duty imposed by a statute is a reasonable restriction designed to further legitimate legislative objectives, the legislature acts within its constitutional powers in imposing such new constraints or duties. 471 U.S. at 104. Filing deadlines like statutes of limitations cannot be substantially complied with, as distinguished from other requirements of the mining laws such

as completion of assessment work requirements. 471 U.S. at 101.

In Locke, this Court considered compliance with the filing deadline, holding that the filing deadline cannot be complied with substantially or otherwise, by filing late--even by one day. 471 U.S. at 101. This court stated:

> Finally, the restriction attached to the continued retention of a mining claim imposes the most minimal of burdens on claimants; they must simply file a paper once a year indicating that the required assessment work has been performed or that they intend to hold the claim. (Emphasis added).

471 U.S. at 106. Such a requirement "...is a reasonable restriction designed to further legitimate legislative objectives, ..." 471 U.S. at 104.

The issues in this case are not within the holding in Locke. They are outside the assumptions upon which this court based its

holding that § 314 is constitutional. In other words, this court implied in Locke that § 314 would not be constitutional if it meant what the Agency and the Court of Appeals have held it to mean in this case.

In this case, Add Ventures complied with the filing deadline, by filing more than one paper with the BLM prior to December 31, 1984 indicating that it intended to hold its claims. Its filings, however, were defective. Add Ventures asserts that it complied timely and substantially with the filing requirement, so its claims should not be forfeited. It points out that Congress did not specify the form of a notice of intent to hold claims and that Congress indicated that it intended substantial compliance as to form and content to be sufficient to avoid forfeiture, because Congress stated in § 314(c) "...but it shall not be considered a failure to file if the instrument is defective or not timely filed for record under other federal laws permitting filing or

recording thereof, ..." This Court also implied that substantial compliance in form and content is sufficient when it stated, "... they must simply file a paper once a year indicating ... that they intend to hold the claim." 471 U.S. at 106.

Thus, the primary issue involves whether substantial, as opposed to literal and hypertechnical, compliance as to form and content was intended by Congress to be sufficient to avoid forfeiture. Furthermore, would the requirement of literal compliance be constitutional?

If the intent of Congress expressed in the statute that a defective filing will not be considered a failure to file is clear, there is no room for agency interpretation. Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843, 104 U.S. 2778, 2781, 81 L.Ed.2d 694 (1984). If, however, the Court determines that Congress does not directly address the precise question, or if the statute is silent or ambiguous, the Court must determine

whether the Agency's construction of the statute is "permissible." Id. Involved in whether the agency action is "permissible" are questions of statutory construction, enforcement of a substantial forfeiture, a taking without just compensation and a denial of equal protection of laws. These are broad concepts beyond the expertise of the Agency on which the courts are the final authorities. Volksvagenwerk Aktiengesellschaft v. Federal Maritime Commission, 390 U.S. 261, 262, 88 S.Ct. 929, 930, 19 L.Ed.2d 1090 (1968).

In this case, the District Court properly gave limited deference to the agency interpretation. It was correct in doing so. The Court of Appeals erroneously deferred to the Agency.

B. 43 U.S.C. 1744 is Unconstitutional as Interpreted by the Court of Appeals and the Department of Interior.

In order to be constitutional, the filing requirement of § 314 must be "a reason-

able restriction designed to further legitimate legislative objectives, ..." 471 U.S. at 104. It has long been recognized that in order not to effect a taking, a land use regulation must substantially advance legitimate governmental interests. If it is not reasonably necessary to the effectuation of a substantial governmental purpose, it may constitute a "taking." Nollan v. California Coastal Commission, 483 U.S. 825, 834, 107 S.Ct. 3141, 3147, 97 L.Ed.2d 677 (1987). See, also, Hodel v. Irving, 481 U.S. 704, 712-718 (1987). It is also well recognized that while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking. First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304, 316, 107 S.Ct. 2378, 2386, 96 L.Ed.2d 250 (1987).

> It is axiomatic that the Fifth Amendment's just compensation provision is "designed to bar Government from forcing some people alone to bear public burdens which, in all

fairness and justice, should be borne by the public as a whole."

482 U.S. at 318, 107 S.Ct. at 2388.

In order to rid the federal lands of stale mining claims and provide for a centralized collection by federal land managers of comprehensive and up-to-date information on the status of recorded but unpatented mining claims, a legitimate legislative objective, it is reasonable to require claim holders to file a paper once a year with the BLM indicating that they intend to hold their claims. It goes beyond reasonable, however, to require that the substance and contents of those notices be perfect in their form and content, especially when the form and content is not prescribed by the statute, upon penalty of forfeiture. In order to carry out the purpose of Congress, all that ought to be necessary is for the BLM to have notice, not that the notice have every i dotted and every t crossed. As described by this Court in Locke, ("...simply file a paper

indicating ... that they intend to hold the claim,") the restriction may be considered reasonably necessary to the effectuation of a substantial government purpose. As interpreted by the BLM and the Court of Appeals in this case, the requirement is not reasonably necessary to the effectuation of a substantial governmental purpose and, therefore, the requirement violates the takings clause.

As previously shown, both Congress and this Court have indicated that a defective filing is not to be considered a failure to file. To impose the penalty of forfeiture of one's property on the basis of a minor defect in form (in this case the notice fully complied with the content requirement), is akin to forfeiture of their heads by the croquet players who missed their turns upon edict of the queen of hearts in Alice's Adventures in Wonderland. The concept that forfeitures are disfavored and should be enforced only in both the letter and the spirit of the law is firmly entrenched and

has been applied consistently by the courts for centuries. United States v. One 1936 Model Ford V-8 Deluxe Coach, 307 U.S. 219, 226, 59 S.Ct. 861, 865, 83 L.Ed. 1249 (1939).

Not only do the decisions of the Ninth Circuit Court of Appeals in this case and in Red Top Mercury Mines, Inc. v. United States, 887 F.2d 198 (9th Cir. 1989), (in which defective notices, in form only, of intent to hold claims are incurable grounds for forfeiture) conflict with the intent of Congress expressed in the statute and of this Court implied in Locke, they conflict with the pronouncements of the Tenth Circuit Court of Appeals in a slightly different but analogous context. Jackson v. Robertson, 763 F.2d 1176, 1180 (10th Cir. 1985) and Topaz Beryllium Co. v. United States, 649 F.2d 775, 778 (10th Cir. 1981) ("§ 1744(c) ... assumes that even defective filings put the Secretary on notice of a claim, and we hold that once on notice, the Secretary cannot deem a claim abandoned merely because the supplemental filings

required only by § 3833-and not by the statute-are not made.")

This Court has not interpreted § 314 since the Locke decision in 1985. That interpretation was confined to one issue, i.e., the constitutionality of the filing deadline. Although the opinion contains comments on other aspects, those comments are not holdings, and it is apparent that the two Circuit Courts of Appeals where most of the federal mining claims are located are in disagreement. It is time for this court once again to consider the FLPMA filing requirement.

In Locke, this Court dealt primarily with the requirement of § 314(a)(2), which provides for annual filings with the BLM. The Court justified that requirement as being designed to avoid forcing the BLM to the "awesome task of searching every local title record" to establish and maintain a federal recording system. Locke, supra, 471 U.S. at 99.

The filing requirement under § 314(a)(1) is not justifiable for the same reason, however. The local recording requirements have been in effect for over a century. They are the cause of, not the solution to, the problem FLPMA seeks to correct. The BLM decision in this case did not mention any deficiency as to the (a)(1) filing. In fact, the BLM did not review the records in the local recording office until June 9 and June 14, 1988, six days after the United States Magistrate filed his Report and Recommendation in this case. At that time, the Assistant Regional Solicitor for the Department of Interior visited the Recorder's Office and searched the records. (US-ER Exhibit 1 to CR 23). Thus, the BLM waited nearly four years to ascertain that the filing had not been made in the local recording office. Obviously, the BLM does not rely on those filings to carry out the legislative purpose of FLPMA. The BLM does not routinely use those records. Apparently it only uses them for litigation purposes, if necessary.

The BLM routinely allows mining claim owners to fail to record their notices in the local recording office prior to December 31 each year without penalty, so long as they file a notice of intent to hold the claim in the BLM office. (AV-ER 5). This appears to be the only case of record in which the BLM has sought to forfeit claims on the basis of a failure to file pursuant to § 314(a)(1).

The filing requirement under § 314(a)(1) is not reasonably necessary to the effectuation of a substantial government purpose. It is not even used for that purpose. Therefore, forfeiture based on that requirement is a taking in violation of the Fifth Amendment.

C. As Applied by the Court of Appeals and the BLM, 43 U.S.C. § 1744 Denies Equal Protection of Laws.

The Fifth Amendment embodies equal protection of laws principles. Matthews v. de Castro, 429 U.S. 181, 182 n. 1, 97 S.Ct. 431, 432, 50 L.Ed.2d 389 (1976).

Common criminals who are in possession of stolen property cannot be required to forfeit that property without following the due process procedures prescribed in 18 U.S.C. § 981 and the Supplemental Rules for Certain Admiralty and Maritime Claims. Apparently, legitimate owners of mining claims can have their property forfeited summarily without any of the protections afforded to criminals.

Congress also has provided that forfeiture of mineral leases can be accomplished only "by an appropriate proceeding in the United States District Court." 30 U.S.C. § 188.

There is no rational basis to afford less protection to the property of mining claim owners than to lessees. Likewise, there is no rational basis for mining claim owners to have less protection of their property interests than is given to persons in possession of stolen or embezzled property or contraband. The forfeiture in this case is a denial of equal protection of laws.

V.

CONCLUSION

The Locke opinion leaves unanswered questions about the constitutionality of § 314 of FLPMA. As a result, an unconstitutional taking of property has been sanctioned by the Court of Appeals in this case. The Ninth Circuit Court of Appeals appears to be in conflict with the Tenth Circuit Court of Appeals. This Court is urged to issue a Writ of Certiorari to review the decisions in this case, so that the decision of the District Court may be reinstated.

RESPECTFULLY submitted the 12 day of August, 1991.

LAW OFFICES OF A. LEE PETERSEN, P.C.
Attorneys for Petitioner

By: _____

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1115 West Fireweed, Suite 204
Anchorage, Alaska 99503
(907) 276-8330

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ADD VENTURES, LTD., Plaintiff-Appellee, v. UNITED STATES OF AMERICA, Defendant, and FRONTIER MINING, INC.; EMPIRE EXPLORATION, INC., Defendant-Interven-ors-Appellants.	No. 90-35573 DC No. CV-87-075-AJK FILED May 15, 1991 Cathy A. Catterson, Clerk U.S. Court of Appeals
ADD VENTURES, LTD., Plaintiff-Appellee, v. UNITED STATES OF AMERICA, Defendant-Appellant	No. 90-35684 DC No. CV-87-075-AJK **MEMORANDUM***

Appeal from the United States District Court for the District of Alaska, Andrew Kleinfeld, District Judge, Presiding
Argued and Submitted May 6, 1991, Seattle, Washington

Before: **WRIGHT** and **O'SCANNLAIN**,[1] Circuit Judges, and **PRO**,** District Judge.

Add Ventures filed its 1984 notice of intent to hold mining claims with the local recording office and the BLM about one month after the deadline set forth in 43 U.S.C. § 1744(c) (FLPMA § 314(a)). Failure to meet the statutory deadline results in automatic forfeiture of the claim. 43 U.S.C. § 1744(c) (FLPMA § 314 (c)); see United States v. Locke, 471 U.S. 84 (1975). Nevertheless, Add Ventures asserts "substantial compliance" with section 1744's filing requirements, referencing several letter sent to the BLM during 1984 which evidenced its intention to hold its claims.

Such letters evidencing an intent to hold a claim are not sufficient to comply with section

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit rule 36-3.

** The Honorable Philip M. Pro, United States District Judge for the District of Nevada, sitting by designation.

1744(a)(2), and thus will not avoid a forfeiture under section 1744 (c). Red Top Mercury Mines, Inc. v. United States, 887 F.2d 198, 205-06 (9th Cir. 1989). Add Ventures attempts to distinguish Red Top Mercury Mines by stressing the amount of money to be lost and the strong indications of intent manifest in the proffered letters. However, neither consideration is relevant to the application of section 1744(c). See Locke, 471 U.S. at 89 (describing money involved in Locke), 100 (evidence of intent to hold is irrelevant).

Moreover, the letters evidencing Add Ventures's intent to hold were not filed with the local recordation office at all. Cf. 43 U.S.C. § 1744(a)(1) or (a)(2) gives rise to a conclusive presumption of abandonment of the claim. An agency's reasonable interpretation of relevant statutes and its own regulations is entitled to "substantial deference." Marathon Oil Co. v. United States, 807 F.2d 759, 765 (9th Cir. 1986), cert. denied, 480 U.S. 940 (1987).

The agency's interpretation of FLPMA and its regulations is reasonable, and thus we reject Add Ventures's contention.

Add Ventures's constitutional arguments were directly or implicitly rejected by Locke. See 471 U.S. at 107 (takings clause), 108-09 (due process). As for the equal protection argument, the forfeiture provision serves the legitimate purpose of apprising the BLM of mining claims on federal land, and we cannot say that automatic forfeiture is not rationally related to that purpose.

REVERSED.

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

ADD VENTURES, LTD.,	)
	)
Plaintiff,	)
	)
v.	)
	)
UNITED STATES OF AMERICA,	)
	)
Defendant.	) A87-075 CV
	)

JUDGMENT

This case came before the court, the undersigned judge presiding, for argument on cross-motions for summary judgment, on April 20, 1990. Plaintiff's motion was granted, and defendant's motion was denied. The court determined that the administrative agency had failed to provide the thirty days set in its own regulation at 43 C.F.R. § 3833.4(b), a regulation which was not applicable because subsequently promulgated in Red Top Mercury Mines Inc. v. United States, A87-F. 2d 198 (9th Circuit, 1989), but is applicable in this case.

It is hereby ordered and adjudged that the agency decision at 95 IBLA 44 (1986) is vacated,

and this matter is remanded to the agency, with directions to proceed in accord with the decision rendered orally on the record April 20, 1990, and in particular to provide a "decision from the authorized officer calling for such information" as required by 43 C.F.R. § 3833.4(b).

April 23, 1990.

Andrew J. Kleinfeld, Judge

See, excerpts from transcript of oral findings, pp. A24-A31.

United States Department of the Interior
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

ADD VENTURES, LTD.

IBLA 85-694 Decided December 19, 1986

Appeal from a decision of the Anchorage District Office, Bureau of Land Management, deeming mining claims abandoned, declaring mining claim recordations void, and rejecting mineral survey applications. AA-39005 through AA-39143.

Affirmed as modified.

1. Administrative Authority: Generally--Bureau of Land Management--Federal land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim--Federal Land Policy and Management Act of 1976: Rules and Regulations--Mining Claims: Determination of Validity

Neither 43 U.S.C. § 1744 (1982) nor the regulations at 43 CFR 3833 require a mineral locator to submit proof of chain of title to BLM. The regulation at 43 CFR 3833.4 provides that failure to file information after notice from BLM as to a deficiency may lead to a determination that a claim is void, but application of the rule is explicitly limited to the information requirements of the regulatory provisions listed in the subsection. The regulatory procedure for dealing with curable defects applies only when information sought by BLM is required by regulation. It does not apply to other information BLM might believe would be useful to its administration of mining claim records so as to permit invalidation of a claim for reasons not enumerated by statute or regulation.

2. Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim

Although 43 U.S.C. § 1744(a) does not prescribe the form a notice of intention to hold a mining claim must take, not every document sent to BLM from which intent might be inferred is sufficient. Rather, whatever the form of the instrument, it must be filed with BLM as a notice of intent. It must indicate that the claim owner continues to have an interest in the claim. It must also be a copy of the document which was or will be recorded with the county or local recorder's office. The instrument must also include a description of the location of the mining claim sufficient to locate the claimed lands on the

ground, the BLM assigned claim number, or the name of the claim.

3. Administrative Procedure: Administrative Review--Rules of Practice: Appeals: Burden of Proof--Rules of Practice: Appeals: Statement of Reasons

An appellant who does not with some particularity show adequate reason for appeal and, as appropriate, support the allegation with argument or evidence showing error cannot be afforded favorable consideration. Conclusory allegations of error, standing alone, do not suffice.

APPEARANCES: A. Lee Petersen, Esq., Anchorage, Alaska, for appellant Add Ventures, Ltd.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Add Ventures, Ltd. has appealed a decision of the Anchorage District Office, Bureau of Land Management (BLM), dated May 14, 1985, deeming 139 lode and placer mining claims abandoned, declaring their recordations void, and rejecting mineral survey applications for the claims.[1] As the basis for its decision the BLM found that the claims' owner had failed to timely file evidence of annual labor or a notice of intention to hold the claim for the calendar year 9184. Appellant contends that BLM's decision is in error because notices of intention to hold the claims were filed with BLM and also argues that BLM should be equitably estopped from voiding the claims due to delays

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1/ The IBLA decision listed the names and numbers of all of the claims in this footnote. It also stated that "the claims are in T. 28 N., Rs. 8 and 9 W., and T. 29 N. Rs. 8 and 9 W., Seward Meridian, Alaska." Claim names and numbers are not being copied here but can be found in the Appendix to the BLM decision, which follows this IBLA decision in this appendix.

by BLM in processing appellant's patent application for the claims.

In regard to its first argument, appellant states that assessment work was performed for 1984, but could not be timely filed because the general partner was in a remote location in the Aleutian Islands. With its statement of reasons appellant has submitted a copy of an affidavit of assessment work recorded with the Talkeetna Recording District on January 30, 1985. Appellant asserts the document was also filed with BLM about the same time and, recognizing that the filing was not timely, presents copies of three letter it sent BLM during 1984.[2] It argues that "[a]ny fair reading of any of the three letters *** conveys notice of the intent of Add Ventures, Ltd. to continue to hold the claims in question." Statement of Reasons at 4.

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[2] Although the originals of the letters appear in the file for the claims, the affidavit of assessment work for 1984 does not. The absence of the affidavit from the case file does not affect the outcome of the issues on appeal.

Appellant's three letters were sent to BLM in response to requests from the agency for documentation establishing a chain of title showing ownership of the claims. By notice dated June 11, 1984, BLM requested documentation showing an unbroken chain of title from the original locators to the current owner and suspended action on filings related to the claims until the information was submitted. Appellant's attorney responded by letter dated July 10, 1984, enclosing a copy of a 1982 quiet title decree from the Superior Court for the State of Alaska, Third Judicial District at Anchorage. By order dated October 10, 1984, BLM determined that the quiet title decree was not sufficient because it did not show complete chain of title and directed the appellant to show cause why the mining claims should not be deemed null and void. The order stated:

> The Department has consistently held that failure to file the supplemental information is treated by the Department as

> a curable defect. A claimant who fails to file the supplemental information is notified and given 30 days in which to cure defect [sic]. If the defect is not cured "the filing will be rejected by an appealable decision." Topaz Beryllium Company v. United States, 649 F.2d 775 (10th Cir. 1981).

Accordingly, the order gave appellant 30 days "to provide the documentation verifying the transfer of interest" and stated that "[i]f sufficient evidence is not received," action would be taken "to declare the mining claim null and void in accordance with 43 CFR 3833.4(b)."

By letter dated November 11, 1984, appellant's attorney replied that he was unable to reach the general partner for Add Ventures, Ltd., who was in the Aleutian Islands, and requested an additional 30 days to respond to the order. He pointed out that it was unclear why further information was being requested, stating: "We are unaware of any law which

requires proof of the entire chain of title to the BLM." By letter dated November 20, 1984, the attorney asked that the order to show cause be vacated and the notice requesting information be withdrawn. The reason given for BLM to take these actions was that the information it sought "is not required pursuant to 43 USC 1744 or 43 CFR 3833." He noted that an abstract of title can be required as part of a patent application, but pointed out that BLM had not "requested the information in that context."

[1] Appellant's attorney was correct in asserting that neither 43 U.S.C. § 1744 (1982) nor the regulations at 43 CFR 3833 require a mineral locator to submit proof of chain of title to BLM. Briefly stated, the statute requires the owner of a mining claim to file with BLM a copy of a notice or certificate of location and to annually file either a notice of intention to hold the claim or an affidavit of assessment work, and also provides that failure to file these documents shall be conclusively

deemed to constitute an abandonment of the claim. The regulations at 43 CFR subpart 3833 were promulgated to establish procedures for filing the documents required by the statute. 43 CFR 3833.0-1. Among other matters, they specify in detail the information to be provided BLM when filing location certificates, 43 CFR 3833.1-2(b), evidence of assessment work, 43 CFR 3833.2-2, and notices of intention to hold, 43 CFR 3833.2-3(b). None requires the locator to provide evidence of chain of title. Nor is such documentation needed. The regulations do not replace state recording requirements and do not make BLM the official repository of documents of title to unpatented mining claims. 43 CFR 3833.0-1(d). While the validity of a mining claim depends upon compliance with both state and federal laws, whether a miner possesses title to a claim he files with BLM is a matter governed by state law. The fact a mining claim has been filed with BLM does not give the claimant rights he does not otherwise possess

nor render the claim valid if it is not otherwise valid under the mining laws. 43 CFR 3833.5.

Because neither the statute nor regulations require a mineral locator to submit evidence of title other than a location notice, BLM did not have authority to require appellant to submit documentation establishing a chain of title. Consequently, BLM could not have declared appellant's claims void either on the basis of the documents of title supplied or for failure to supply them. The regulation cited by BLM in its order to show cause as the proposed basis for declaring the claims null and void, 43 CFR 3833.4(b), does provide that failure to file information after notice from BLM as to a deficiency may lead to a determination that a claim is void, but its application is explicitly limited to the information requirements of 43 CFR 3833.1-2(b), 3833.2-1(c), 3822.2-2(a) and (b), and 3833.2-3(b) and (c).

The subsection was added subsequent of the decision in Topaz Beryllium Co. v. United States, 649 F.2d 775 (10th Cir. 1981). See 47 FR 19298 (May 4, 1982) (proposed rules); 47 FR 56300, 56303 (Dec. 15, 1982) (final rules). The suit challenged a number of the regulations promulgated by the Department in 43 CFR subpart 3833. See Topaz Beryllium Co. v. United States, 479 F.Supp. 309, 311 (C.D.D. Utah, 1979). The district court found the regulations to be reasonable and within the delegated authority of the Secretary of the Interior. Id. at 315. The Tenth Circuit affirmed. Both courts, however, noted that subsection 1744(c) applies only to failure to file the documents required by the statute, and the Tenth Circuit approved the Department's procedure of treating failure to file supplemental information required by regulation as a curable defect. Topaz Beryllium Co. v. United States, 649 F.2d at 778. Thus, while BLM correctly described the law in its order to show case, the law it described does

not apply in regard to the information BLM sought. The regulatory procedure for dealing with curable defects which allows a claim to be declared invalid for failure to file requested information applies only when the information sought by BLM is required by regulation. It does not apply to other information BLM believes might be useful to its administration of mining claim records. When BLM wishes to obtain such additional information, it should simply request that the mining claim owner provide it.[3]

[2] Although the information called for by BLM was not required by the regulations, neither the notice nor order qualify appellant's letters as notices of intention to hold its claims. We do not disagree with the appellant that the

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[3] The matter is quite different when an application for patent has been filed. A patent applicant is required by regulation to supply either a certificate or abstract of title, 43 CFR 3862.1-3. Alternatively, he may establish possessory title under 30 U.S.C. § 38 (1982). See BLM Manual § 3862.3. Whatever method is used, an applicant must satisfy BLM that he owns fully possessory title to any claim for which he seeks patent.

letter could support an inference that it intended to hold the claims; however, under the controlling statute and regulation the question is not whether appellant supplied a document which indicated that it intended to hold its claims, but whether it filed a notice of intent.

As an alternative to filing an affidavit of assessment work, subsection 1744(a) permits a locator to file a notice of intent. Appellant correctly states the statute does not prescribe the form a notice must take, but this does not mean that any document sent to BLM from which intent might be inferred is sufficient. See Paul S. Coupy, 35 IBLA 112, 115 (1978). Rather, whatever the form of the instrument, it must be filed with BLM as a notice of intent. 43 U.S.C. § 1744(a)(2) (1982); 43 CFR 3833.2-3(a). It must indicate that the claim owner continues to have an interest in the claim. 43 CFR 3833.0-5(l). It must also be a copy of the document which was or will be recorded in the local office where the claim's location notice has

been recorded. 43 U.S.C. § 1744(a)(1); 43 CFR 3833.2-3; Ronald Willden, 60 IBLA 173 (1981); Ted Dilday, 56 IBLA 337, 88 I.D. 682 (1981). The instrument must also include "a description of the location of the mining claim sufficient to locate the claimed lands on the ground," 43 U.S.C. § 1744(a)(2) (1982), the BLM assigned claim number, 43 CFR 3833.2-3(b)(1)(i), or the name of the claim, Arley Taylor, 90 IBLA 313, 314 (1986); Philip Brandl, 54 IBLA 343, 344 (1981). While the letters from appellant's attorney identify the claims by their assigned claim numbers, nothing in the case file shows them to have been recorded with the Talkeetna Recording District, nor do the letters themselves indicate that they were sent to BLM to be filed as notices of intent. Thus, we conclude that appellant's letters to BLM do not meet the requirements of the statute and

regulation. Ronald Willden, supra; John Murphy, 58 IBLA 75, 82 (1981).[4]

Appellant's second argument is that BLM should be estopped from voiding the claims due to its delays in processing patent applications for them. this argument is puzzling because there is no indication in the case files that appellant has in fact filed on or more patent applications for the claims. In addition to the file for the mining claims, BLM has forwarded the files for mineral surveys (M.S.) 2384, 2451, and 2452. the file for M.S. 2384 shows that the survey of 115 claims was approved March 16, 1984, and copies of the approved plats and field notes were sent to appellant under cover letter dated may 29, 1984. The files for M.S. 2451 and

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[4] Appellant suggests that under 43 U.S.C. § 1744(c) (1982) a defective instrument is sufficient. The plain language of the provision, however, reveals that it concerns defective instruments "filed for record under other Federal laws permitting filing or recording" such as the Mining in the Parks Act, 16 U.S.C. §§ 1901-1912 (1982), and not section 1744 itself. John Murphy, 58 IBLA 75, 82 (1981).

2452 appear to be incomplete, but do show that M.S. 2451 was approved on August 10, 1982 and that M.S. 2452 has been ordered but not yet performed. Mining claims and mill sites not conforming to the subdivision of the public lands survey must be surveyed and the survey posted on the claim or site before an application for patent may be filed. See 30 U.S.C. § 29 (1982); 43 CFR 3861.1, 3861.7, 3863.1, 3864.1. Consequently, an allegation as to delay in processing appellant's patent application could be made, at best only in regard to the claim surveyed by M.S. 2451, if indeed a patent application was filed.

[3] We need not determine whether a patent application was filed or the reasons it may still be pending in order to consider appellant's argument concerning estoppel. Appellant bases its argument on the statements appearing in United States v. Locke, 471 U.S. 84 (1985), which once again acknowledge that estoppel may apply against the government. In

numerous decisions this Board has discussed in detail the judicial standards it has adopted and follows in determining whether in a given case the government is to be estopped. See, e.g., Ptarmigan Co., Inc., 91 IBLA 113 (1986), and cases cited therein. None of these standards have been addressed by the appellant. An appellant who does not with some particularity show adequate reason for appeal and, as appropriate, support the allegation with arguments or evidence showing error cannot be afforded favorable consideration. United States v. Connor, 72 IBLA 254 (1983), Rocky Mountain Natural Gas Co., 55 IBLA 3 (1981). Conclusory allegations of error, standing alone, do not suffice. United States v. Fletcher DeFisher, 92 IBLA 226 (1986). Accordingly appellant's estoppel argument is rejected because it presents no basis upon which to conclude that in this case estoppel ought to be applied against BLM.

Although we find that BLM properly deemed appellant's claim abandoned under 43 U.S.C. § 1744 and 43 CFR 3833, we must modify BLM's declaration that the recordations of the claims are void, and its rejection of appellant's mineral survey applications. The former cannot be sustained because it does not have any legal effect. It is apparent from the case file that appellant's claims were properly filed with BLM in 1977 as required by 43 U.S.C. § 1744(b) (1982). That the claims are now null and void does not change this fact, nor can it be changed by a BLM decision. We recognize that BLM's intent may have been to indicate that its records would be changed to show the claims are now void and that no mining claims exist for the land, but if this was its purpose, the statement concerning recordation was unnecessary. The mining claims are void due to appellant's failure to file during 1984 either evidence of assessment work or a notice of intention to hold as required by the statute, and this fact is

sufficient for BLM to make appropriate changes in its records.

BLM's rejection of appellant's mineral survey applications for M.S. 2384 and M.S. 2451 was inappropriate because no application for survey was pending at the time. Rather the surveys had been completed and approved. Upon approval, a mineral survey becomes part of the public land survey. Thus, if any action were appropriate, it would be cancellation of the mineral survey itself. See Walter Bartol, 19 IBLA 82 (1975); but see Shank v. Holmes, 137 P. 871, 874-75 (Ariz. 1914). In contrast, assuming the case file is correct, rejection of the application for M.S. 2452 was appropriate because the survey had been ordered but not made.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

Franklin D. Arness, Administrative Judge

We Concur:

James L. Burski, Administrative Judge

Gail M. Frazier, Administrative Judge

United States Department of the Interior
BUREAU OF LAND MANAGEMENT
ANCHORAGE DISTRICT OFFICE
4700 East 72nd Avenue
Anchorage, Alaska 99507

IN REPLY REFER TO:
3842/3861 (014)
AA-12965
AA-40284
AA-40285
AA-39005
through
AA-39143

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Add Ventures, Inc.	AA-12695 Mineral Survey
c/o Bigler, Hawkins & Oberdorf	Application (M.S. 2384)
3709 Spenard Road	AA-40284 Mineral Survey
Anchorage, Alaska 99503	Application (M.S. 2451)
	AA-40285 Mineral Survey
Mr. William F. Hall	Application (M.S. 2452)
c/o Howard Grey & Assoc. Inc.	AA-39005 through AA-39143
3105 Lakeshore Drive	Discovery on Willow
Anchorage, Alaska 99501	Creek et al., 1/
	Placer Mining Claims
Hall Yentna Mining Company	
c/o Howard Grey & Assoc. Inc.	
3105 Lakeshore Drive	
Anchorage, Alaska 99501	

Mining Claims Deemed Abandoned
Mining Claim Recordations Declared Void
Mineral Survey Applications Rejected

On May 10, 1977, mining claim location notices for the mining claims listed on the attached appendix were filed with the Bureau of Land Management (BLM), as required by Sec. 314 of the Federal Land Policy and Management Act of 1976

(FLPMA), 43 U.S.C. Sec. 1744 (1982), and the regulations in 43 CFR 3833. The notices state the claims were located between May 1906 and October 1961, and the claims are in T. 28 N., Rs. 8 and 9 W., and T. 29 N., Rs. 8 and 9 W., Seward Meridian, Alaska.

Section 314(a) of FLPMA requires the owner of an unpatented mining claim located prior to October 21, 1976, to file evidence of annual labor or notice of intention to hold with BLM by October 22, 1979, and by December 30 of each year thereafter.

The penalty for failure to make timely annual filings with BLM is addressed in Sec. 314(c) of FLPMA:

> The failure to file such instruments as required by subsections (a) and (b) shall be deemed conclusively to constitute an abandonment of the mining claim, mill or tunnel site by the owner ...

Because the 1984 affidavit of assessment work or notice of intention to hold was not timely filed, the mining claims listed on the attached appendix are deemed abandoned and declared void. Donald L. Hoffman, 58 IBLA 327 (1981); Don G. Gilbertson, 59 IBLA 143 (1981); Lynn Keith, 53 IBLA 192 (1981); U.S. Supreme Court Decision, United States et al. v. Locke et al., No. 83-1394 (April 1, 1985). The BLM casefiles will be closed when this decision becomes final.

The mineral survey casefiles AA-12965 (M.S. 2384), AA 40284 (M.S. 2451) and AA-40285 (M.S. 2452) will be closed when this decision becomes final.

It should be noted that the State of Alaska has filed selection applications on T. 28 N., Rs. 8 and 9 W., and T. 29 N., Rs. 8 and 9 W., Seward Meridian, Alaska and these townships are now closed to location and entry under the Federal mining laws.

An appeal from this decision may be taken to the Board of Land Appeals, Office of hearings and Appeals, in accordance with the attached regulations in Title 43 Code of Federal Regulations (CFR), Part 4, Subpart E. If an appeal is taken, the notice of appeal must be filed in the Anchorage district Office of the Bureau of Land Management within 30 days of the receipt of this decision. Do not send the appeal directly to the Board. The appeal and case history file will be sent to the Board from this office. the regulations also require the appellant to serve a copy of the notice of appeal, statement of reasons, written arguments or briefs on the Regional Solicitor, Alaska Region, U.S. Department of the Interior, 701 C Street, Box 34, Anchorage, Alaska 99513. To avoid summary dismissal of the appeal, there must be strict compliance with the regulations. Form 1842-1 is enclosed for additional information.

If an appeal is taken, the party to be served with a copy of the notice of appeal is:

State of Alaska
Department of Natural Resources
Division of Technical Services
Title Administration
Pouch 7035
Anchorage, Alaska 99510-7035

Barbara Nather
Chief, Mining Claim
Recordation Adjudication Unit

Enclosures: (5)

1 - Appendix]

2 - Form 1842-1

3 - Appeal Regulations

4 - 43 CFR 3833

5 - Sec. 314 of FLPMA

APPENDIX

BLM SERIAL NO	CLAIM NAME	LOCATION DATE
AA-39005	Discovery on Willow Creek	May 12, 1934
AA-39006	No. 1 Above Discovery	June 7, 1906
AA-39007	SURPRISE CLAIM	September 16, 1906
AA-39008	Gulch Placer	August 20, 1914
AA-39009	Alder No. 1	September 13, 1921
AA-39010	Willow Claim	September 13, 1921
AA-39011	Alder No. 2	September 13, 1921
AA-39012	Discovery Placer	May 13, 1932
AA-39013	Number One Above Discovery	May 13, 1932
AA-39014	Number Two Above Discovery	May 13, 1932
AA-39015	"Bread Line"	May 4, 1932
AA-39016	No. 3, Above Discovery	May 13, 1932
AA-39017	Number Four Above Discovery	May 13, 1932
AA-39018	Number Five Above	May 13, 1932
AA-39019	No. 3 on Little Willow	August 26, 1933
AA-39020	No. 4 on Little Willow	August 26, 1933
AA-39021	No. 5 on Little Willow	August 26, 1933
AA-39022	Fraction	April 27, 1934
AA-39023	The No. 1 on Lucky Placer	April 27, 1934
AA-39024	No. 3 on Willow Creek	May 23, 1934
AA-39025	No. 1 on Willow Creek	May 23, 1934
AA-39026	No. 2 on Willow Creek	May 23, 1934
AA-39027	GOPHER GULCH	July 1, 1934
AA-39028	DISCOVERY ON RUBY GULCH	July 1, 1934

AA-39029	DISCOVERY on Snow Shoe Gulch	September 8, 1934
AA-39030	No. 1 Above Discovery	October 1, 1934
AA-39031	Discovery on Rocky Gulch	August 28, 1934
AA-39032	No. 1 Above Discovery on Rocky Gulch	October 1, 1934
AA-39033	Number One on Falls Gulch	September 29, 1934
AA-39034	No. 1 Above Discovery on Gopher Gulch	October 1, 1934
AA-39035	No. 2 Above Discovery	October 1, 1934
AA-39036	Dry Creek Gulch	July 1, 1935
AA-39037	No. 6, Number Six	July 1, 1935
AA-39038	No. 7, NO.7	July 1, 1935
AA-39039	No. 8, Number 8	July 1, 1935
AA-39040	No. 9, Number Nine	July 1, 1935
AA-39041	No. 1 Fraction	August 27, 1935
AA-39042	Korter Bench	May 17, 1936
AA-39043	McDonald Bench	May 17, 1936
AA-39044	NUMBER ONE On Joy Gulch	July 1, 1936
AA-39045	Number 4, No. 4 on Willow Creek	July 1, 1936
AA-39046	NUMBER 5 on Willow Creek	July 1, 1936
AA-39047	No. One on Little Willow	August 1, 1936
AA-39048	No. 2, Two on Little Willow Creek	August 1, 1936
AA-39049	No. 6 on Cottonwood Creek	August 1, 1936
AA-39050	No. 7 on Cottonwood Creek	September 1, 1936
AA-39051	No. 3 on Lucky Gulch	September 23, 1936
AA-39052	No. 4 on Lucky Gulch	September 23, 1936
AA-39053	Merry Bench	June 6, 1939
AA-39054	Merry Bench # No. 2	June 6, 1939

AA-39055	Porcupine No. 1	August 25, 1943
AA-39056	Porcupine No. 2	August 25, 1943
AA-39057	Victory Association No. One	August 14, 1944
AA-39058	Victory Association No. Two	August 14, 1944
AA-39059	Lost Shovel No. One	September 26, 1944
AA-39060	Lost Shovel No. Two	September 26, 1944
AA-39061	Alexander No. One	September 26, 1944
AA-39062	Alexander No. Two	September 26, 1944
AA-39063	Flora No. Two	September 26, 1944
AA-39064	Beaver No. One	September 26, 1944
AA-39065	Daisy No. 1	July 20, 1945
AA-39066	Daisy No. 2	July 20, 1945
AA-39067	Hidden Treasure #1	July 21, 1945
AA-39068	Hidden Treasure #2	July 21, 1945
AA-39069	Flora No. One	July 21, 1945
AA-39070	Moose No. One	July 21, 1945
AA-39071	Smokey Discovery	September 28, 1945
AA-39072	Smokey No. 1	September 28, 1945
AA-39073	Smokey No. 2	September 28, 1945
AA-39074	Smokey No. 3	September 28, 1945
AA-39075	Smokey No. 4	September 28, 1945
AA-39076	Smokey No. 5	September 28, 1945
AA-39077	Smokey No. 6	October 1, 1945
AA-39078	Smokey No. 7	October 1, 1945
AA-39079	Smokey No. 8	October 1, 1945
AA-39080	Cottonwood No. 8	October 2, 1945
AA-39081	Cottonwood No. 9	October 2, 1945

AA-39082	Cottonwood No. 10	October 2, 1945
AA-39083	Discovery on Pass Creek	April 20, 1947
AA-39084	Number 1 on Pass Creek	April 20, 1947
AA-39085	No. 2 on Pass Creek	May 20, 1947
AA-39086	No. 3 on Pass Creek	May 20, 1947
AA-39087	No. 4 on Pass Creek	June 20, 1947
AA-39088	Woolie Dog No. 3	September 29, 1947
AA-39089	Woolie Dog No. 4	September 29, 1949
AA-39090	Woolie Dog No. 1	October 2, 1949
AA-39091	Woolie Dog No. 2	October 2, 1949
AA-39092	DISCOVERY ON RUBY	June 30, 1953
AA-39093	Discovery on Gopher Mt.	July 17, 1955
AA-39094	No. Above Discovery	July 7, 1953
AA-39095	No. 1 on Poorman Creek	July 28, 1955
AA-39096	No. 2 on Poorman Creek	July 29, 1955
AA-39097	No. 3 on Poorman Creek	August 25, 1955
AA-39098	Discovery on Ruby Creek	May 14, 1906
AA-39099	Alder #2	August 30, 1958
AA-39100	Cottonwood #3	August 30, 1958
AA-39101	Seattle #1	August 31, 1958
AA-39102	Seattle #2	August 31, 1958
AA-39103	Seattle #3	September 1, 1958
AA-39104	Contact No. 4	September 2, 1958
AA-39105	Seattle #4	September 2, 1958
AA-39106	Contact Claim #2	September 3, 1958
AA-39107	Contact No. 5	September 3, 1958
AA-39108	Contact #3	September 3, 1958

AA-39109	Contact No. 1	September 10, 1958
AA-39110	Cottonwood No. 4	August 13, 1958
AA-39111	Contact No. 8	June 27, 1961
AA-39112	Contact No. 7	June 27, 1961
AA-39113	Peters Creek No. 1	June 28, 1961
AA-39114	Peters Creek No. 2	June 28, 1961
AA-39115	Peters Cr #5	July 15, 1961
AA-39116	Peters Cr #6	July 15, 1961
AA-39117	Peters Creek No. 11	August 3, 1961
AA-39118	Peters Creek No. 14	August 3, 1961
AA-39119	Peters Creek #9	August 3, 1961
AA-39120	Peters Creek #10	August 3, 1961
AA-39121	Peters Creek No. 15	September 10, 1961
AA-39122	Peters Creek No. 16	September 10, 1961
AA-39123	Peters Creek #17	September 10, 1961
AA-39124	Peters Creek #8	July 15, 1961
AA-39125	Upper Peters Creek No. I	October 15, 1961
AA-39126	Upper Peters Creek No. 2	October 15, 1961
AA-39127	Upper Peters Creek No. 3	October 15, 1961
AA-39128	Upper Peters Creek No. 4	October 1961
AA-39129	Upper Peters Creek No. 5	October 1961
AA-39130	UPPER PETERS CR. #6	October 1961
AA-39131	Upper Peters Creek No. 9	October 1961
AA-39132	Upper Peters Creek No. 10	October 1961
AA-39133	Upper Peters Creek No. 7	October 1961
AA-39134	Upper Peters Creek No. 8	October 1961
AA-39135	Peters Creek # 11	August 3, 1961

AA-39136	Upper Peters Creek No. 12	October 1961
AA-39137	Upper Peters Creek No. 13	October 15, 1961
AA-39138	Upper Peters Creek No. 14	October 15, 1961
AA-39139	Contact # 6	July 1, 1958
AA-39140	Peters Creek No. 3	July 15, 1961
AA-39141	Peters Creek No. 4	July 15, 1961
AA-39142	Peters Creek # 12	August 3, 1961
AA-39143	Peters Creek # 13	August 3, 1961

The following excerpts from the transcript of the oral decision (US-ER CR 107, pp. 49-62) contain the District Court's most pertinent comments:

I find this a terribly difficult case, and people imagine that sentencing is the hardest thing that a judge does. Perhaps it's just a personal peculiarity but I find it often much more difficult to make determinations where there are respectable people with good faith claims on both sides and no one has committed any crime and someone has a vast amount to lost. I find that a really agonizing decision.

Part of the discomfort of a decision of that sort of problem has been responsible for the centuries of development of the proposition that equity abhors a forfeiture and the strain that the law has put on mortgages, deeds of trust, tax foreclosure statutes, and every other kind of forfeiture provision in order to avoid having the hammer dropped if there was any intellectually honest way of avoiding it.

Here is my reasoning, as I approach a result. Congress wrote a statute at 43 USC Section 1744 which appears to have been passed into law prior to the final proofreading step. For this reason, at least one very important sentence of the statute is ungrammatical to the point of not making sense. The sentence at 1744(a)(1). It has an either without an or, and we have to guess where the or should be.

The statute at 1744(c) uses the term abandonment but in a sense explained by the Locke decision at 471 US 84 not to mean what the law ordinarily means by abandonment at all but rather to mean forfeiture. * * *

But something was filed with the Bureau which surely showed an intention to hold and that was the letters to which Mr. Petersen has drawn our attention. Now, under the Locke, decision, since abandonment in subsection C does not really mean abandonment, the intention of Add Ventures to hold is immaterial. What's more, the actual knowledge by the BLM of Add-Venture's

actual intention to hold is immaterial. Nevertheless there is some saving language in the forfeiture section in the same sentence in 1744(c).

It says that, I think that the or not timely filed for record under other federal laws, is correctly analyzed by Mr. Dunsmore as inapplicable to this case. However, there is an independent clause that it shall not be considered a failure to file if the instrument is defective. Now, in this case there is no question but that Add Ventures filed something. It filed letters by its lawyer which demonstrated an intent to hold. There is also no question but that filing was defective. It did not satisfy 1744(a)(1) and (2). I suppose the question is whether it was an instrument, whether those lawyers' letters are instruments.

My inclination, were there nothing more, would be to say that they are not instruments. An instrument means a recordable instrument in the sense of 1744(a)(1) and (2). The matter is

complicated, though, by the regulations at 43 USC (CFR ?) Section 3833.4(b).

That regulation divides failures to file into two classes. It says that one failure to file constitutes an abandonment. The other failure to file does not conclusively constitute an abandonment but instead the information shall be filed within 30 days of receipt of the decision calling for such information. In the division of classes made, the kind of filing which was required of Add Ventures falls into class B rather than class A by the literal application of the words of the regulation. The kind of filing was a section 3833.2-3(b) filing. That is the kind of that was not made. That is a notice of intention in the form of a reproduction of an instrument filed in the State Recorder's Office.

Mr. Dunsmore makes what I think is a very sensible argument, that BLM could not have meant to water down the statute and probably lacked the power to water down the statute so what they

must have meant was to grant the grace period only for the information in 3833.2-3(b) which is, which goes beyond what 43 USC Section 1744(a) requires. In other words, the information required by the regulation but not the statute, as a grace period. It's a perfectly sensible argument.

In the context of a forfeiture, though, I think that the literalism of, I think that Add Ventures is entitled to the benefit of a literal interpretation of the regulation. It would be turning centuries of legal tradition on their head to favor a forfeiture to the extent of finding the sense of a regulation different from its literal meaning.

If the statute were without any room for administrative interpretation, then perhaps such a liberal and loose reading as is advocated by the government might be appropriate. But as I've already indicate, the statute obviously lacked a proofreading step. At the very least, as I believe it was Justice Stevens said,

somebody left a typo, an o-n where they meant o-r in the statute or else somebody left out the word or, a very important word in any law. Ors, ands, and nots are about as critical as words ever get in the law.

There is room for, plenty of room for difficulty in understanding what the statute means. * * *

BLM could have written a regulation at 3833.4(b) which said that 3833.2-3(b) information is in the grace period class unless it is also information required by 1744(a) in which case it falls into the non grace period class of subsection A of the regulation. Since this is a forfeiture statute interpreting a somewhat ambiguous forfeiture statute and a forfeiture regulation interpreting a somewhat ambiguous forfeiture statute, I think that Add Ventures is entitled to the benefit of a literal application of the regulation.

A literal application of the regulation says that Add Ventures' failure to file shall not be

deemed conclusively to constitute an abandonment of the claim but such information shall be filed within 30 days of receipt of a decision from the authorized officer calling for such information.

I looked again at the IBLA decision at 95 IBLA 44. It does not call for such information. I also looked again at the BLM's initial decision of May 14, 1985 a couple of years after the regulation was promulgated, and it does not call for such information. It contains boilerplate with regard to appeal rights in the last two paragraphs as most administrative agency decisions do. One would think that it would also have a boilerplate paragraph, that is a paragraph that is just called up from the word processor on all decisions, calling for the information required by 3833.2-3(b). It doesn't have that. * * *

* * * I conclude that the letters were defective instruments in the clause after the semicolon of 1744(c) and that the agency was required to proceed pursuant to its own

regulation at 43 CFR 3833.4(b). I suppose that the appropriate remedy now is to remand with directions to proceed in accord with this decision. * * *

MR. DUNSMORE: All I have, two questions 'cause I'm now confused with what the Court is, in fact, ruling. Is the Court, in fact, stating that BLM cannot determine that the claims were abandoned for failure to meet the state requirement, 1744(a)(1) which that provision about cure does not go to because it's very possible BLM will come along and determine, irrespective of whatever may be offered by Add Ventures that that separate requirement has not been met. So, if the Court is precluding the government from dong that, the ruling should be very clear. It is not clear on that point.* * *

THE COURT: That was exactly what I meant. it says failure to file such instruments as required by subsection A and that subsection A refers to both the instrument to be filed in the

State Recorder'[s Office and the instrument to be filed in the BLM. * * *

* * * I understand the view that has been taken, however, my reading of section 1744 is as I've indicated, that the regulation which creates a kind of equity of redemption applies to both filings. The reason for this analysis is that the BLM has no interests in state property, law or the state recording system except insofar as it bears on the federal government's ability to determine whether there are claims or, in the nature of mining claims on federal lands.

The purpose of the reference to the filing in the State Recorder's Office or the local recorder's office at 1744(a)(1) is only to describe the form of the instrument a copy of which must be filed with the BLM in subsection two so that the BLM will be able to have a registry of mining claims.

As far as whether the plaintiffs get their claim back, if it wasn't properly forfeited

because there was an equity of redemption that the BLM failed to observe, they never lost the claim. I have told you that I am troubled by the case. If find this a difficult case. I may be in error but that is my analysis of the statute. * * *

* * * I think I've gone as far as I can usefully go. In consequence, the rulings are as follows.

Defendant's motion for summary judgment at docket number six is denied.

Plaintiff's motion for summary judgment at docket number nine is granted.

The magistrate's report and recommendations at docket number 21 as amplified by his final report is accepted in part. The ruling is consistent with the magistrate's recommendation but the reasoning was not entirely in accord with the magistrate's reasoning.

§3833.2-3 Contents for a notice of intention to hold claim or site.

(a) A notice of intention to hold a mining claim or group of mining claims may be filed at the election of the owner, regardless of whether the assessment has been suspended, deferred or not yet accrued. However, the claimant shall file with the Bureau of Land Management the same documents which have been or will be recorded with the county or local office of recordation. A notice of intention to hold a mining claim shall be effective only to satisfy the filing requirement for the year (as specified in §3833.0-5 of this title), in which the notice is filed. The filing of a notice with the Bureau of Land Management shall not relieve the owner of complying with Federal and state laws pertaining to the performance of annual assessment work.

(b) A notice of intention to hold a mining claim or group of mining claims shall be in the form of either:

(1) An exact legible reproduction or duplicate, except microfilm, of an instrument, signed by the owner of the claim of his/her agent, which was or will be filed for record pursuant to section 314(a)(1) of the Act in the local jurisdiction of the State where the claim is located and recorded setting forth the following information:

(i) The Bureau of Land Management serial number assigned to each claim upon filing in the proper BLM office of a copy of the notice or certificate of location. Citing the serial number shall comply with the requirement in the Act to file an additional description of the claim;

(ii) Any change in the mailing address, if known, of the owner or owners of the claim;

(2) A reference to the decision on file in the proper BLM office by date and serial number which granted a deferment of the annual assessment work.

(3) A reference to a pending petition for deferment of the annual assessment work required by 30 U.S.C. 28 by date of filing and serial number and with the proper BLM office.

(c) A notice of intention to hold a mill or tunnel site or group of mill or tunnel sites shall be in the form of a letter or other notice signed by the owner(s) of such sites or their agent(s) setting forth the following information:

(1) The Bureau of Land Management serial number assigned to each site upon filing in the proper BLM office of a copy of the official record of the notice or certification of location;

(2) Any change in the mailing address, if known, of the owner(s) of the site(s).

[47 FR 56306, Dec. 15, 1982; 48 FR 7179, Feb. 18, 1983]

§3833.4 Failure to file.

(a) The failure to file an instrument required by §§3833.1-2(a) and 3833.2-1 of this title within the time periods prescribed therein, shall be deemed conclusively to constitute an abandonment of the mining claim, mill or tunnel site and it shall be void.

(b) The failure to file the information required in §§3833.1-2(b), 3833.2-1(c), 3833.2-2(a) and (b) or 3833.2-3(b) and (c) shall not be deemed conclusively to constitute an abandonment of the claim or site, but such information shall be filed within 30 days of receipt of a decision from the authorized officer calling for such information. Failure to file such information within the time allowed by decision shall cause the filing to be rejected by a decision appealable under the procedures of Part 4 of this title. Final affirmance of such rejection for failure to file such information shall be deemed conclusive evidence of abandonment of the

mining claim, mill or tunnel site and such mining claim, mill or tunnel site shall be void.

(c) The fact that an instrument is filed in accordance with other laws permitting filing for record thereof and is defective or not timely filed for record under those laws shall not be considered failure to file under this subpart. The fact that an instrument is filed for record under this subpart by or on behalf of some, but not all of the owners of the mining claim, mill or tunnel site shall not affect the validity of this filing.

(d) Any mining claim deemed abandoned under section 314(c) of the Act for failure to file an instrument in the local jurisdiction of the State where the claim is located pursuant to section 314(a)(1) and (b) of the Act, shall not be validated by filing the instrument with the BLM in accordance with §3833.2-1 of this title, and such instrument is ineffective even though the claim may currently be shown to exist in the BLM records.

(2)

No. 91-277

In the Supreme Court of the United States

OCTOBER TERM, 1991

ADD VENTURES, LTD., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner forfeited certain unpatented mining claims by failing to make the filings with state and federal authorities that are required by Section 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1744.

2. Whether Section 314 is constitutional as applied to this case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is not reported. The district court did not issue a written opinion; its judgment and excerpts from an oral statement explaining its decision are reprinted, respectively, at Pet. App. A5-A6 and Pet. App. A39-A48. The decision of the Interior Board of Land Appeals (Pet. App. A7-A27) is reported at 95 I.B.L.A. 44. The decision of the Bureau of Land Management (Pet. App. A28-A38) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1991. The petition for a writ of certiorari was filed on August 12, 1991. The jurisdic-

tion of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1744, requires persons holding unpatented mining claims on public lands to make annual filings with both state and federal authorities in order to preserve their claims. For claims located prior to the statute's enactment, Section 314(a)(1), 43 U.S.C. 1744(a)(1), requires a claimant to file each year, in the state office in which the claim is recorded,

> either a notice of intention to hold the mining claim (including but not limited to such notices as are provided by law to be filed when there has been a suspension or deferment of annual assessment work), an affidavit of assessment work performed thereon, on [*sic*] a detailed report provided by section 28-1 of title 30, relating thereto.

Section 314(a)(2) of FLPMA, 43 U.S.C. 1744(a)(2), requires the claimant to file with the Bureau of Land Management, no later than December 30 of each year, "a copy of the official record of the instrument filed or recorded" with state authorities.[1] Under Sec-

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[1] Although the statute calls for the filing of "a copy of the official record of the instrument filed or recorded" with the appropriate state or local recordation office, 43 U.S.C. 1744(a)(2), the Department of the Interior has determined that in some States it is not possible for a claim owner to make a timely filing in the state or local office and to obtain a copy of that instrument in time to meet the statutory deadline for filing the instrument with BLM. 47 Fed. Reg. 56,301 (1982). Consequently, the Department has promulgated a regulation providing that a claim owner must file with BLM a copy of the instrument which "was or will be filed," 43 C.F.R. 3833.2-2(a) (1988), or "which [has] been or will be filed for record,"

tion 314(c), 43 U.S.C. 1744(c), "[t]he failure to file such instruments as required by [43 U.S.C. 1744(a)(1)-(2) and (b)] shall be deemed conclusively to constitute an abandonment of the mining claim * * * by the owner; but it shall not be considered a failure to file if the instrument is defective or not timely filed for record under other Federal laws permitting filing or recording thereof * * *."

The purpose of Section 314, as this Court noted in *United States* v. *Locke*, 471 U.S. 84, 87 (1985), is to "rid federal lands of stale mining claims and to provide federal land managers with up-to-date information that allows them to make informed land management decisions." [2] In *Locke*, a case in which a claimant was deemed to have forfeited a valuable claim by missing the federal filing deadline by one day, this Court made clear that the claimant's actual intention is immaterial. "Specific evidence of intent to abandon is simply made irrelevant by § 314(c)," the Court held, and "the failure to file on time, in and of itself, causes a claim to be lost." 471 U.S. at 100. The Court also upheld the constitutionality of the statute. The forfeiture provision is a "reasonable, if severe, means of furthering [the statutory] goals,"

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43 C.F.R. 3833.2-3(b) (1988), with the State. (Since the time relevant to this case, the regulations have been amended in a manner not material to the questions presented. Our citations are to the regulations in force at the time relevant to this case.)

[2] Traditionally, the extent and duration of any rights to unpatented mining claims have been governed by local law. See 30 U.S.C. 23, 26, 28. Claimants had long been required to make filings with local authorities to establish compliance with the annual work requirement set forth in 30 U.S.C. 28. Section 314 of FLPMA builds on this practice and assures that federal authorities will have easy access to copies of instruments filed with state authorities.

the Court explained, and the statute does not "take" property within the meaning of the Fifth Amendment. *Id.* at 106, 107.

2. Petitioner Add Ventures, Ltd., is a limited partnership that held a number of unpatented mining claims on public lands in Alaska. Petitioner did not file its affidavit of 1984 assessment work with the State or the BLM until January 1985, approximately one month after the statutory deadline. Accordingly, the BLM issued a decision declaring the claims abandoned pursuant to Section 314(c). Pet. App. A28-A38.[3]

Petitioner took an administrative appeal to the Interior Board of Land Appeals. Petitioner argued, *inter alia*, that three letters it sent to BLM in 1984, responding to the agency's requests for documentation establishing a chain of title to the claims, should be treated as "notice[s] of intention to hold the claim[s]" within the meaning of the statute. See Pet. App. A11-A15. The IBLA rejected that contention and upheld BLM's decision. *Id.* at A19-A22.

Although the statute does not specify the form that a notice of intention must take, the IBLA explained, it does not follow "that any document sent to BLM from which intent might be inferred is sufficient." Pet. App. A20. Rather, the document "must be filed with BLM as a notice of intent"; "[i]t must indicate that the claim owner continues to have an interest in the claim"; "[i]t must * * * be a copy of the document which was or will be recorded in the local office where the claim's location notice has been recorded"; and it "must * * * include 'a description

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[3] The BLM decision also noted that the lands at issue are now closed to entry. Pet. App. A30. The consequence, as in *Locke*, 471 U.S. at 91, is that petitioner cannot again attempt to locate its claims on those lands.

of the location of the mining claim sufficient to locate the claimed lands on the ground.' " *Id.* at A20-A21. Petitioner's 1984 letters to BLM did not satisfy those requirements, the IBLA concluded, because they were not filed or recorded with state authorties and they were not sent to BLM to be filed as notices of intent. *Id.* at A21.

3. Petitioner brought this action in the United States District Court for the District of Alaska seeking judicial review of the IBLA's decision. Ruling on cross-motions for summary judgment, the district court ruled that the 1984 letters could be regarded as defective notices of intention that were sufficient to preserve petitioner's claims. Relying on 43 C.F.R. 3833.4(b), the court ordered BLM to provide petitioner with 30 days to correct any defects in those documents. Pet. App. A5-A6; see *id.* at A39-A48.

4. In an unpublished memorandum decision, the court of appeals reversed. Pet. App. A1-A4. The court held that "letters evidencing an intent to hold a claim are not sufficient to comply with [43 U.S.C.] 1744(a)(2)." *Id.* at A2-A3. The court also noted that petitioner's letters "were not filed with the local recordation office at all," as required by 43 U.S.C. 1744(a)(1); and it upheld the agency's interpretation of the statute to require forfeiture of a claim in these circumstances as reasonable. *Id.* at A3, A4. The court also rejected petitioner's contention that the statute is unconstitutional as applied, finding that *Locke* "directly or implicitly rejected" that contention. *Id.* at A4. "[T]he forfeiture provision serves the legitimate purpose of apprising the BLM of mining claims on federal land," the court explained, and the "automatic forfeiture" prescribed by the statute is "rationally related to that purpose." *Ibid.*

ARGUMENT

1. Petitioner contends that the letters it sent to BLM in 1984 should be deemed "notices of intention to hold [its] claims" for purposes of Section 314's filing requirements.

It is undisputed that the instruments by which petitioner actually sought to comply with Section 314(a) in 1984, the affidavits of assessment work that it submitted to state authorities and BLM in January 1985, were filed out of time. See Pet. 8. Although petitioner sent letters to BLM in 1984 from which a subjective intention to hold the claims might have been inferred, those letters did not satisfy the unambiguous requirements of the statute.

By its terms, Section 314(a) creates two filing requirements, both of which must be satisfied each year. First, a claimant must file in the appropriate state or local recordation office an affidavit of assessment work or a notice of intention to hold its claims. 43 U.S.C. 1744(a)(1). Second, the claimant must file with BLM "a copy of the official record of the instrument filed or recorded" with the State. 43 U.S.C. 1744(a)(2). Petitioner failed to satisfy either requirement. In 1984, it made no filing whatsoever in the local recording office. Moreover, the only documents that petitioner sent to BLM in 1984—letters responding to requests for information on the chain of title to the claims—were not copies of instruments that were or could have been filed with state authorities (see Gov't C.A. Br. 11), nor did they "indicate that they were sent to BLM to be filed as notices of intent" (Pet. App. A21). Under the mandatory terms of Section 314(c), therefore, petitioner must "be

deemed conclusively" to have abandoned the unpatented claims at issue.[4]

Contrary to petitioner's contention (Pet. 26-28), nothing in *Locke* casts any doubt on that conclusion. The Court's observation that Section 314 "imposes the most minimal of burdens on claimants," in that "they must simply file a paper once a year indicating that the required assessment work has been performed or that they intend to hold the claim," 471 U.S. at 106, does not remotely suggest that any "paper" filed with either state or federal authorities is sufficient. The import of the Court's statement is only that literal compliance with the statute is not onerous. Elsewhere in its opinion, the Court squarely rejected the proposition that "substantial compliance" is sufficient to preserve claims from forfeitures mandated by Section 314 (471 U.S. at 102):

> Congress has made it unnecessary to ascertain whether the individual in fact intends to aban-

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[4] Petitioner contends (Pet. 27-28) that the letters should be regarded as "defective" notices for purposes of the proviso to Section 314(c), which states that "it shall not be considered a failure to file if the instrument is defective or not timely filed for record under other Federal laws permitting filing or recording thereof." The agency has consistently construed that provision, however, to excuse only defects "under other Federal laws," and not FLPMA itself. Cf. *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 15-16 (1981) ("It is doubtful that the phrase 'any statute' includes the very statute in which this statement was contained."). That interpretation was previously upheld by the Ninth Circuit. *Red Top Mercury Mines, Inc.* v. *United States*, 887 F.2d 198, 206 (1989).

Even if the word "defective" were not limited by the phrase "under other Federal laws," it would not alter the result in this case. Petitioner made no filing with state authorities, defective or otherwise, in 1984, and the letters it sent to BLM were not notices of intent at all.

> don the claim, and there is no room to inquire whether substantial compliance is indicative of the claimant's intent—intent is simply irrelevant if the required filings are not made.

2. Petitioner also argues (Pet. 29-36) that the application of Section 314 to this case constituted an unconstitutional taking of its claims. *Locke* forecloses that contention. See 471 U.S. at 103-110. There, the Court held that the forfeitures prescribed by Section 314 are not "takings" of property within the meaning of the Fifth Amendment, because they result from avoidable failures to comply with the filing requirements rather than from governmental action (471 U.S. at 107):

> [I]t was [the] failure to file on time—not the action of Congress—that caused the property right to be extinguished. Regulation of property rights does not "take" private property when an individual's reasonable, investment-backed expectations can continue to be realized as long as he complies with reasonable regulatory restrictions the legislature has imposed.

The Court also held that Section 314's filing requirements, together with the forfeiture provision, are such "reasonable regulatory restrictions." It explained that the statute's purposes—"to rid federal lands of stale mining claims and to provide for centralized collection by federal land managers of comprehensive and up-to-date information on the status of recorded but unpatented mining claims"—are "clearly legitimate." 471 U.S. at 105-106. The forfeiture provision, the Court continued, "is a reasonable, if severe, means of furthering these goals." *Id.* at 107.

Locke's reasoning was not, as petitioner suggests (Pet. 34-36), limited to the requirement of a filing with BLM under 30 U.S.C. 1744(a)(2). Indeed, the

two filing requirements work together in serving the statute's purposes. In keeping with the role that local law has played in the recognition of unpatented mining claims, see note 2, *supra*, the first subsection requires claimants to make regular filings in the state offices where those interests are recorded. The second requirement assures that federal managers of public lands will have easy access to copies of the instruments claimants have filed with the States. It is not irrational for Congress to have favored that system over the regime implicit in petitioner's position—in which federal managers would be forced to determine whether any paper submitted to them in a given year was indicative of an intent to preserve a claim and would be left to speculate whether such a document (or any other) had been filed with state authorities. In any event, petitioner did not comply with either of the applicable requirements; in order to prevail, therefore, he would have to show that both are unconstitutional.[5]

3. There is no conflict between the court of appeals' decision in this case and either *Jackson* v. *Robertson*, 763 F.2d 1176 (10th Cir. 1985), or *Topaz Beryllium Co.* v. *United States*, 649 F.2d 775 (10th Cir. 1981). In those cases, as petitioner concedes

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[5] As this Court noted in *Locke*, the statute also "provides [claimants] with all the process that is their constitutional due." 471 U.S. at 108. As this case reflects, that process includes an administrative determination of a claimant's compliance with the filing requirements, followed by administrative and judicial review. Petitioner does not and cannot suggest that those procedures have deprived it of an opportunity to present factual or legal contentions material to the statutory requirements. The fact that forfeitures under other statutes are effected through different procedures does not suggest that unpatented mining claims receive "less protection" than other interests in property; nor does it give rise to any issue of equal protection. See Pet. 37.

(Pet. 33-34), the Tenth Circuit merely recognized that the Department of the Interior has promulgated regulations requiring claimants to provide more information in their Section 314 filings than the statute itself prescribes and that a forfeiture may not be based on a failure to provide information required only by the regulations.[6] In this case, the agency and the court of appeals determined that petitioner failed to make the filings required by the statute itself. Pet. App. A2-A3, A20-A21. Nothing in *Jackson* or *Topaz Beryllium* indicates that the Tenth Circuit would overlook such an omission.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] That distinction is reflected in 43 C.F.R. 3833.4 (1988), the regulation on which the district court relied. That regulation provides that "[t]he failure to file *the information* required in [specified regulations which supplement the statutory requirements] shall not be deemed conclusively to constitute an abandonment of the claim or site, but *such information* shall be filed within 30 days of receipt of a decision from the authorized officer calling for *such information*." 43 C.F.R. 3833.4(b) (1988) (emphasis added). The regulation does not purport to excuse a failure to make the basic filings required by the statute.

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